IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

TUESDAY, THE 13TH NOVEMBER 2007 / 22ND KARTHIKA 1929

WP(C).No. 33410 of 2007(B)

AGAINST THE ORDER IN EP 283/06 IN
OS.89/2005 of M.C., PERINTHALMANNA.
.....

PETITIONER:

K.ALIKKUTTY, S/O.KOMU, KALLUPALAN HOUSE, J.N.ROAD, PERINTHALMANNA AMSOM, DESOM.

BY ADV. SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR

RESPONDENT:

K.DAMODHARAN, S/O.LATE N.P.KUTTISANKARA MENON, "ARADHANA", ANGADIPPURAM AMSOM DESOM.

BY

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 13/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N. KRISHNAN, J.

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W.P.C. NO. 33410 OF 2007

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Dated this the 13th day of November, 2007.

J U D G M E N T

This writ petition is filed challenging the order of the Munsiff, Perinthalmanna in E.P.283/06 in O.S.89/05. The judgment debtor is an employee in the District Co-operative Bank having a salary of Rs.13,151/-. It is contended that after deduction his carry home salary is only Rs.1/- and therefore he is not having any means to pay the decree debt and so he cannot be arrested in execution of the decree. It is also submitted that he had availed a loan for the purpose of construction of a house and the property is mortgaged. This Court in the decision reported in ***Kuppuswamy v. P.G. Menon (1992 (2) KLT 203)*** held that,

> "Where it is proved or admitted or otherwise evident that the judgment debtor owns or posses a house or has got interest therein, the normal presumption is that he is able to pay the debt either by sale or mortgage or creating other encumbrance of the house. In such circumstances, it is open

> to the judgment debtor to rebut the presumption and prove either that he does not own or possess the house or that no alienation or encumbrance is possible of that property."

2. Section 55 of the CPC contemplates that arrest can be ordered only if the judgment debtor has had the means to discharge the debt after passing of the decree that he is intentionally evading payment. Whatever it may be when a person's carry home salary is Rs.1/- one cannot hold that he is having cash with him to discharge the decree debt. But at the same time if it is proved that there are properties on the basis of which he is capable of raising the fund it is a matter that has to be looked into by the Court. Of course this is only a rebutable presumption whereby the judgment debtor can establish that he is not in a position to mortgage the property on account of specific circumstances or reasons. So, in the light of this principle I consider that the matter requires reconsideration at the hands of the Court below and therefore the order under challenge is set aside and the

matter is remitted back to the executing Court for fresh consideration. Both the parties be given opportunities to adduce evidence in support of their respective contentions, especially to the judgment debtor to rebut the presumption of law enshrined in the decision above quoted and dispose of the matter in accordance with law. The judgment debtor is directed to appear before the Court below on 10.12.07 and on that day the Court shall give notice to the decree holder, fix a date and thereafter dispose of the matter in accordance with law. Till the matter is finally disposed of the judgment debtor shall not be arrested and detained in civil prison.

The writ petition is disposed of accordingly.

M.N. KRISHNAN, JUDGE.

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